Immigration and refugee board

Background Paper

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THE IMMIGRATION AND REFUGEE BOARD: PROPOSED CHANGES

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IMMIGRATION AND REFUGEE BOARD: PROPOSED CHANGES

INTRODUCTION

On 2 March 1995, the Minister of Citizenship and Immigration announced in the House of Commons two proposals relating to the Immigration and Refugee Board (the IRB or "the Board"). These are 1) the introduction of legislation to reduce the normal refugee determination panel from two members to one member and 2) the creation of an Advisory Committee to assist in the selection of members for appointment to the Board. The Minister also announced that the chairperson of the new Advisory Committee would be Mr. Gordon Fairweather, that the new Deputy Chairperson of the Board's Refugee Division would be Mr. John Frecker and that the new Executive Director of the Board would be Mr. Jean-Guy Fleury. The following day, the Immigration and Refugee Board announced a major restructuring of its refugee investigation and hearing processes. This paper will provide background information on the proposed changes.

CHANGING TO ONE-MEMBER REFUGEE PANELS

A. The Current Situation

The *Immigration Act* currently provides that the normal quorum for hearing a refugee claim by the Refugee Division of the IRB is two members (section 69.1(7)).[1] Except in three specified cases, a split decision of a two-member panel is treated as a positive decision

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(1) If the claimant consents, the quorum may be reduced to one member (section 69.1 (8)). If the government does not intend to participate in a hearing, one member of the Refugee Division may make a positive decision *without* a hearing (section 69.1(7.1)) but not a negative one. This is called the expedited process.

in favour of the claimant (section 69.1 (10)).[2] Thus, a claimant need convince only one member of the panel of the legitimacy of the claim in order to be accepted as a Convention refugee. The government proposes to change this system so that all refugee claims would be heard by a panel of one member, except for complex cases, where the Chair would have discretion to assign more than one member.[3]

B. The Plaut Report

In 1985, Rabbi Gunther Plaut completed *Refugee Determination in Canada*,[4] his comprehensive report for the government, which contained proposals for a new refugee determination system. The *sine qua non* for any new system was a high-quality oral hearing before the actual decision-maker, but Rabbi Plaut offered three possible models:

> **Model A**[5] -- An oral hearing before a three-member panel, followed by an appeal to the Federal Court, for which no leave would be required.
>
> **Model B** -- An oral hearing before a one-member panel, with negative decisions reviewed centrally (Ottawa) by a three-member panel on the basis of transcript evidence, any further material brought forward by the claimant, and oral testimony if the panel felt it necessary. There would be an appeal, with leave, to the Federal Court.
>
> **Model C** -- An oral hearing before a one-member panel, with negative decisions heard orally by a three-member panel. There would be an appeal, with leave, to the Federal Court.

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(2) The three exceptions are: 1) where there are reasonable grounds to believe that the person has, without valid reasons, destroyed or disposed of his or her identity documents; 2) where the person made a refugee claim and then visited the country of claimed persecution; and 3) where a person comes from a country prescribed by Cabinet to be a country that respects human rights (section 69.1(10.1)). Note that no countries have been prescribed. In the above situations, a split decision by a two-member panel would result in a negative decision on the refugee claim.

(3) Applications by the Minister that the Refugee Division reconsider and vacate any decision on the grounds that the person has ceased to be a refugee, or that the determination was obtained by fraudulent means or misrepresentation, suppression or concealment of any material fact will presumably continue to require a three-member panel, with the decision of the majority being the decision of the panel.

(4) W. Gunther Plaut, *Refugee Determination in Canada*, [hereafter The Plaut Report] Employment and Immigration Canada, Ottawa, 1985.

(5) Rabbi Plaut credited Professor James Hathaway of Osgoode Law School for Model A.

Rabbi Plaut concluded that *any of these models would be acceptable*. He ranked personal preferences as C, A, and then B. Note that the two models with a single decision-maker at the first instance (B and C) would have had an internal review by the Board -- an oral re-hearing in model C and a review based on a transcript in model B. In both cases, the reviewing body at the Board would have been composed of three members.

C. Proposals of the Standing Committee on Labour, Employment and Immigration

In the fall of 1985, the Standing Committee studied the Plaut Report and made recommendations to the government regarding the new refugee determination system.(6) Instead of endorsing one of Rabbi Plaut's models, the Committee proposed its own. This consisted of an oral hearing by a two-member panel, with split decisions constituting acceptance of the claim. This process could be followed by an appeal, with leave, to the Federal Court.

Although the Committee did not provide an explanation of its choice of model, the rationale was apparent in the testimony of Charles Groos, presenting a brief to the Committee from the Inland Refugee Society of British Columbia:

> We have ... come to the opinion that collegial decision-making is perhaps the best way of ensuring an accurate result on a refugee claim. Therefore we have come to the opinion that it would perhaps be best to have the initial tribunal composed of not one but two people. We say this because the issue of credibility in refugee claims is usually overpoweringly important because not many refugee claimants are capable of corroborating their claims with any kind of documentary evidence or independent testimony. It is very rare. Therefore we believe that ... more than one person should be involved.(7)

After dismissing the idea of a three-member panel because it presented scheduling difficulties, he continued: "Therefore we concluded that perhaps as little as two people would

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(6) House of Commons, Standing Committee on Labour, Employment and Immigration, *Refugee Determination in Canada: The Plaut Report, Minutes of Proceedings and Evidence*, 1st Session, 33rd Parliament (1984-85), Issue 46.

(7) *Ibid.*, Issue 44, p. 8-9.

be adequate." The group also introduced the concept of deeming a split decision to be a decision in favour of the claimant.

The Committee's proposal of a two-person model was accepted in principle by the government in the spring of 1986 and was part of Bill C-55, introduced into the House of Commons in June 1987 and in force since the beginning of 1989. Most witnesses heard by the legislative committee that examined Bill C-55 accepted the two-person model without comment. It has generally been interpreted as giving the benefit of the doubt to the claimant, in keeping with the longstanding view of the United Nations High Commissioner for Refugees that, although the burden of proof lies with the claimant, the frequent difficulties of providing conclusive proof suggest that a claimant whose account appears credible should be given the benefit of the doubt, unless there are good reasons to the contrary.(8)

D. Law Reform Commission Draft Final Report

One who did question the concept of the two-person panel prior to its implementation was John Frecker, then a Commissioner with the Law Reform Commission of Canada (and, as of April 1995, the Deputy Chair of the Refugee Division at the IRB). He noted in testimony before the legislative committee on Bill C-55 (1987) that there did not seem to be a need for such a panel: "if there was a full oral hearing on the merits [of the claim] before a person who was a member of the refugee board then that would meet the requirements of the [refugee] Convention."(9) Following the oral hearing, Mr. Frecker favoured a paper review of negative decisions by the Appeal Division of the Board.

This opinion was further fleshed out in a Law Reform Commission study of 1992, overseen by Mr. Frecker.(10) Although the Commission was abolished before the study could

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(8) *Handbook on Procedures and Criteria for Determining Refugee Status*, Office of the United Nations High Commissioner for Refugees [hereafter *Handbook*], paragraph 196, p. 47.

(9) Legislative Committee on Bill C-55, *Minutes of Proceedings and Evidence*, 2nd Session, 33rd Parliament (1986-87), Issue 8, p. 144.

(10) *The Determination of Refugee Status in Canada: A Review of the Procedure*, Draft Final Report, 5 March 1992 [hereafter, Draft Final Report]. See Appendix A to this paper for the extract from the report that discusses this issue.

be formally approved, translated and printed, agreement had been reached on many points, including the one under discussion here.

The Draft Final Report noted refugee advocates' belief that the current system, requiring a positive decision from just one member, minimized the risk of bad decisions. It also found that many Board members preferred sharing the burden of decision-making, and the collegiality that this produced over time, as members sat in panels with one another. The Commission concluded, however, that a single-member panel should be introduced. It noted that two-member panels likely result in a higher level of acceptances, and are more expensive to support and schedule. A single-member panel would cost less, would be easier to schedule, and would enable the same number of members to handle more cases (assuming meeting rooms were available).

According to the Commission, the advocates' belief that two-member panels minimized risk revealed "a lack of confidence in the capacity of individual board members to make reasoned and reasonable decisions." (The advocates themselves may have generally agreed with this assessment.) The Commission's opinion was that collegiality could be fostered by other methods.

More fundamentally, the Commission commented that no other Canadian legal structure had such a model for initial decision-making, not even criminal trials, which carry potentially devastating consequences for the accused. Criminal trials require unanimity for a decision either to convict or acquit. If the trial is by jury, all members must agree or a new trial must be held; if no jury is present, a single judge decides. In other situations where a panel of members decides, decisions are by consensus, or by majority vote.

The Commission was also of the view that single-member panels might result in "more reasoned and responsible decision-making" because the entire responsibility would fall on one member's shoulders. Individuals incapable of reasoned and responsible decision-making on their own should not be appointed to the Board; and individuals who, following training, proved incapable of performing adequately should be removed.

In any event, the Commission's opinion was that any risks inherent in single-member panels would be offset by the possibility that negative decisions could be reviewed.

E. Appeal Mechanism

The need for an improved appeal process has been expressed by most critics from the very beginning of the current refugee determination system. With the proposal to change from two-member panels to single-member panels, these criticisms will likely intensify. It will be remembered that, of the models proposed by Rabbi Plaut, only Model A did **not** have an internal review system (that is, review by the Board) before court review. Model A, however, had a *three-member* panel making the initial decision. Models B and C began with a single decision-maker but had a review mechanism -- involving respectively a review of the transcript or another oral hearing -- before judicial review by the Federal Court.

The reasons for the ongoing disquiet on this issue were summarized in a recent study carried out by Lorne Waldman and Susan Davis at the request of the Minister of Citizenship and Immigration. In their report, entitled *The Quality of Mercy*,[11] they cited the following deficiencies of the current appeal system:

> There has been concern in the non-governmental sector that the current restricted appeal process, with its leave requirement, limited access to higher courts and limited ground for judicial review is inadequate to correct mistakes made at the Convention Refugee Determination Division (CRDD).
>
> There is no appeal on the merits of the claim and no opportunity for consideration of new evidence or of change in circumstance.
>
> There is no mechanism for ensuring consistency of decision making across Canada as well as for assessing the competency of the decision makers at the CRDD.
>
> There is no confidence in Immigration mechanisms to "save" the mistakes at the CRDD.
>
> There is no merit based process for the appointment of qualified persons to the CRDD.[12]

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(11) Susan Davis and Lorne Waldman, *The Quality of Mercy, A study of the processes available to persons who are determined not to be refugees and who seek humanitarian and compassionate treatment*, March 1994 (publicly released May 1994).

(12) *Ibid.*, p. 22.

Waldman and Davis recommended that all negative decisions be reviewed by a separate Refugee Appeal Division of the IRB. Review would be in writing and would be centralized, have strict time limits, and allow submission of both new evidence and proof of changed country conditions. The review panel could accept the claim, reject it, ask for further evidence, or order a new hearing.(13)

Suggestions for a system for review of initial decisions also came from the Law Reform Commission of Canada in its Draft Final Report, although it must be noted that these suggestions had not received final approval before the Commission was abolished. In any event, the report as drafted recommended that a reviewing panel consider the record of the initial proceeding (which would have been conducted by one person, as discussed above) to see if there were any procedural defects or consider any new evidence that had not been available at the time of the hearing; it would not consider the merits of the decision, except where this was clearly inconsistent with the evidence given at the hearing.

Another prominent supporter of an internal review system at the Immigration and Refugee Board was the current Minister of Citizenship and Immigration. In November 1993, the Honourable Sergio Marchi was quoted in the press as wanting to change the refugee determination system so that negative decisions could be appealed within the Board. He said that if the lack of an appeal was a "weak link, then you can contemplate saying [the refugee determination process is] a weak chain.(14) No announcement was made, however, of an enhanced appeal or review system.(15)

F. Discussion

From the mid-eighties to the present time, commentators on the refugee system have stressed the importance of a high-quality initial hearing -- to be achieved by the

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(13) *Ibid.*, p. 31; p. 44-47.

(14) *Toronto Star*, 28 November 1993.

(15) Prior to the Minister's announcement on 2 March 1995, the press had reported that a new system to review negative decisions would be introduced, at a cost of $2.5 million (*Globe and Mail*, (Toronto), 24 February 1995, p. A2).

appointment of excellent members, substantial initial and ongoing training of members, and accurate and up-to-date information on country conditions. There is no doubt that the move to a single-member initial decision-maker at the IRB will be interpreted by refugee advocates as diluting the quality of the hearing. They will likely assert that this change will increase the unfairness of a system that is already tilted against claimants.(16)

The government partly anticipated this reaction by creating the Advisory Committee (see below) and by linking the issue of competence to the proposal for a single-member panel: "We want the best people for the job. It is mandatory that the best people are named to the board because the reduction in panel size requires unquestioned and unflinching competence from every member."(17)

The Board has perhaps also anticipated this reaction. Currently, the only review mechanism available apart from the Federal Court is the Board's limited jurisdiction to re-examine cases where a breach of natural justice may have occurred. In the absence of legislative changes, this would appear to be as far as it can go. Interesting, then, is the following commitment made on 3 March 1995 as part of the Board's Action Plan:

> The Board will supervise more closely the exercise of its jurisdiction to reopen cases where there may have been a breach of the principles of natural justice so as to ensure that a coherent and systematic approach is adopted.

No further details were provided, but "supervise" implies a review of all negative decisions. Since the principles of natural justice can be interpreted broadly, this new

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(16) Advocates for claimants point out the difficulties claimants have in proving their claims: the frequent lack of documentary proof, the existence of specific country conditions that may not be fully understood by outsiders, the need to testify through an interpreter, the aftermath of persecution which may make testifying difficult, the particular difficulties many women have in describing persecution with sexual aspects, and so on. On the other hand, it should be noted that some critics of the Board claim that the process is currently tilted *in favour of the claimant* precisely because claims are so difficult to verify, with so much resting on the apparent credibility of the claimant and whether the claimant's story fits the general pattern of other claims from the particular country of origin in question.

(17) The Hon. Sergio Marchi, *Statement*, 2 March 1995, p. 9. (Speaking Notes for the House of Commons, included with the *News Release*, Citizenship and Immigration Canada, 2 March 1995.)

commitment could benefit at least some claimants who receive a negative decision. It somewhat resembles the model proposed by the Law Reform Commission.

Are there ways in which the Board could minimize any negative effects of the proposed move to one-person panels? The introduction of an internal review process, as discussed above, would likely be the single most important possible change. It remains to be seen whether enhanced supervision by the Board will suffice.

Whether or not an internal review process is implemented, however, the training of Board members will need to be reassessed. It would seem important that, as an integral part of their training, new members observe a significant number of hearings, and discuss the process later with the presiding member. New members could also sit beside experienced members at hearings. Increased use could be made of videotapes and mock hearings as learning tools.

Indications that the Board plans to implement improved training came with the announcement of 3 March 1995. In particular, mention was made of personalized training and practice at presiding in real hearing situations; detailed training on questioning approaches and skills; and ongoing monitoring of performance. Further, the Board announced that it would be issuing a new *Commentary on the Assessment of Credibility* and holding sessions on the subject.

Would a sole initial decision-maker produce more refusals? It will be remembered that the Law Reform Commission of Canada thought two-member panels likely to increase the acceptance rate, and this does seem probable.[18] In recent years, information in the Board's data bank suggests that there has been a relatively low percentage of positive decisions from split panels - approximately 5%, calculated on a national basis. Thus, even if the acceptance rate were to drop, the overall effect would not be very significant.[19] Furthermore, a member sitting alone might find it more difficult to hand down a negative decision than if sitting with another member whose positive decision would be overriding. If that were to be the case, the rate of acceptance might still go down, but by an even smaller percentage.

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(18) This is, however, different from stating that the *purpose* of the change is to reduce the acceptance rate, as some press reports claimed.

(19) The Board's acceptance rate varies from year to year and has moved within a range of more than 20% since its inception.

APPOINTMENT OF MEMBERS TO THE BOARD

A. The Minister's Announcement

On 3 March 1995, the Minister announced the creation of a seven-member Advisory Committee composed of the Chairperson of that Committee (Mr. Fairweather), the Chairperson and the two Deputy Chairs of the Board, and three other members appointed by the Minister with advice from Mr. Fairweather. These last three members are to be chosen from the legal community, non-governmental organizations involved with refugees, and the general public, and will likely serve a two-year term. Members will be reimbursed for their expenses but will receive no additional salary or honorarium. The Committee will choose applicants from among those responding to notices in the *Canada Gazette* and referrals from the government and will assess them in accordance with criteria established by the Minister in consultation with the Chairperson of the Board. Most importantly, the Minister has committed himself not to appoint or reappoint any member to the Board who has not been recommended by the Committee. For the government's statement of how the Advisory Committee will work, please see Appendix B to this paper.

B. The Concerns

The method of making appointments to the IRB has been controversial since the Board was first proposed. There is universal agreement that Board appointments should be of the highest quality possible. As Rabbi Plaut said in 1985: "It is this person who is at the heart of the determination process" (emphasis in original).[20] Equally, there is a nearly universal feeling that appointments for patronage purposes can undermine that goal. Rabbi Plaut cited pitfalls identified by a prominent administrative law lawyer:

> Governments of all party stripes have used appointments to administrative agencies for patronage purposes. As a result, such appointees not infrequently possess limited qualifications on merit for the demands of the position. It is therefore not surprising that the performance of these appointees leaves something to be

(20) Plaut Report, p. 132.

> desired. Critical to the success of any refugee status determination procedure will be the quality of the appointees. Their credentials and training must be equal to the task. Otherwise the results will be disappointing.(21)

Many witnesses before the legislative committee on Bill C-55 echoed these sentiments.

C. Rabbi Plaut's Recommendation

Rabbi Plaut recommended in his 1985 report that, before the government made appointments and re-appointments to the Board, non-governmental organizations, such as the bar, Amnesty International and religious groups, should be invited to submit names. The Minister would not have been bound by the suggestions.(22)

D. Canadian Bar Association Task Force Report

In 1990, the CBA published a study on the independence of federal tribunals and agencies, which included recommendations on how appointments should be made.(23) The CBA study was not confined to the IRB, but it did single out the Board in a number of respects and mentioned the negative reaction of many to the initial appointments when the IRB became operational in 1989.(24)

The study found the appointment process to federal boards and tribunals generally in need of reform, as had other preceding studies.(25) It summed up the difficulties thus:

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(21) *Ibid.*, p. 133-34, quoting from a submission by Professor William Angus, Osgoode Hall Law School, York University.

(22) *Ibid.*, p. 134.

(23) Canadian Bar Association, *Report of the Canadian Bar Association Task Force on The Independence of Federal Administrative Tribunals and Agencies in Canada*, September 1990 [hereafter Canadian Bar Association].

(24) *Ibid.*, p. 18.

(25) For example, Law Reform Commission of Canada, Report 26, *Independent Administrative Agencies*, 1985.

> ... the absence of an open and systematic appointments process makes it much easier to appoint political supporters as a reward and without regard for qualifications. There are a number of objections to "patronage" appointments. If appointments are made only from amongst supporters of the government in power, there may be a perception that the tribunal is neither independent nor indifferent when it is called upon to adjudicate cases in which the government appears as a party. Where an appointment is made solely or, indeed, largely as a reward, there may be a perception on the part of the person receiving the appointment that he or she is not under any obligation to work hard. Patronage appointments may also adversely affect the work of the tribunal by creating a revolving-door situation in which the rewards are spread around and the expertise and continuity necessary to function well are never developed.(26)

It is important to note that the CBA Report did not recommend that the government should abdicate responsibility for making appointments. Not did it conclude that people should be disqualified for appointment merely because they have been active in politics. Rather, "what must be avoided is for political 'qualifications' to be a determining or major factor in the appointment process." Identified as important qualifications were: professional training, experience, ability to conduct a hearing, ability to write, and expertise related to the specific tribunal's needs. Interestingly, the report recommended that appointments to tribunals such as the IRB, which are adjudicative only (that is, they decide individual cases) should be made by the Minister of Justice.(27)

E. The Law Reform Commission Draft Final Report

In field research conducted as part of its 1992 study, the Commission "observed wide variations in the performance of individual Board members. Most were highly sensitive to the responsibility with which they had been entrusted. Others, however, manifested serious

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(26) Canadian Bar Association, p. 57-58.

(27) *Ibid.*, p. 60-61.

problems in the manner in which they conducted hearings, dealt with evidence presented and decided cases in a reasoned fashion."[28]

The Commission declined to offer an exhaustive list of qualifications for appointment to the Board, but identified two essential qualities that it felt were sometimes lacking: experience with making important decisions -- in particular, the ability to evaluate claims rationally rather than emotionally -- and the ability to empathize with claimants' situations.[29]

The Commission echoed the calls of others for a change in the appointment process. Recommendation 41 stated:

> A rational system of recruitment, vetting and selection of candidates for appointment to the Immigration and Refugee Board should be established. The present systems for selecting provincial judges in Ontario and Quebec might be considered as possible models.[30]

F. The Hathaway Report

Rebuilding Trust, the most recent report to raise concerns about the appointment process and published at the end of 1993, was by James Hathaway, a Professor at Osgoode Hall Law School.[31] Professor Hathaway reported the concerns of Board members themselves about the competency of some of their colleagues, including the opinion of one Assistant Deputy Chair (ADC) that, ideally, 80% of the members under that ADC's supervision would be dismissed.[32] Hathaway was blunt about the importance of this issue: "The absence of

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(28) Draft Final Report, p. 141. This section of the report had been approved by the Commission.

(29) *Ibid.*, p. 142-43.

(30) *Ibid*, p. 144.

(31) *Rebuilding Trust, Report of the Review of Fundamental Justice in Information Gathering and Dissemination at the Immigration and Refugee Board of Canada*, December 1993 [hereafter Hathaway Report]. The report was commissioned by the Chairperson of the Immigration and Refugee Board.

(32) *Ibid.*, p. 37.

qualitative criteria and clear processes to govern the appointment and re-appointment of members of the Refugee Division has, more than any other single factor, resulted in a lack of respect for and confidence in decision makers among both RHOs [refugee hearing officers] and counsel...."[33] He noted with approval the Law Reform Commission's assessment of the attributes essential for Board members.

Professor Hathaway agreed with the government's decision to advertise Board vacancies in the *Canada Gazette*, and recommended additional outreach in professional and community publications. He proposed the establishment of Regional Advisory Committees to recommend to Cabinet who should be appointed and re-appointed to the Board. He went further than other commentators in recommending that no appointment should be made against the advice of the Regional Committee.

According to this report, the composition of each Regional Advisory Committee would be: the Deputy Chairperson of the Refugee Division (chair), a practising lawyer, a delegate from the Canadian Council for Refugees, a member of a federal tribunal exercising comparable responsibilities, and a delegate of the Privy Council. The Committee would also solicit the advice of others, such as Board staff, lawyers, and non-governmental organizations.[34]

In its initial response to the Hathaway Report, the Board questioned whether it would be advisable for the proposed Regional Advisory Committees to consider reappointments to the Board, since the lawyers and non-governmental representatives on the Committee would also be individuals appearing before the Board. Such a review by active participants could, it was suggested, seriously compromise the independence of the Board.[35]

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(33) *Ibid.*, p. 38.

(34) *Ibid.*, p. 41. See recommendation 25, p. 42. Hathaway noted at page 41 (footnote 68) that in May 1992 the Canadian Council for Refugees had passed the following resolution: "The CCR demands (i) an open and systematic appointment process to the CRDD that considers relevant factors to refugee determination; and (ii) that a potential nominee to the CRDD be approved in consultation with the appropriate regional CBA immigration subsection and regional affiliate of the CCR."

(35) Immigration and Refugee Board, *Preliminary Response to the Recommendations in Rebuilding Trust, a Report by Professor James Hathaway*, June 1994, p. 13.

G. Discussion

The precedent in establishing an Advisory Committee, and, more importantly, the Minister's agreement that individuals recommended by the Committee should be considered for appointment, should not be underestimated. Professor Hathaway was amazed:

> This is philosophically a really important change. The government is following through on its promises to begin doing something about the ability of the system to be susceptible to patronage... I'm actually quite astounded to see it.(36)

At the same time, it should be noted that the Board is composed of seven members. Of those, only two will clearly and necessarily be "advocates for refugees" in the sense used by both Board supporters and detractors. These are the representatives from the bar and from non-governmental organizations involved in refugee matters; of the remaining five, one will be chosen by the government from the general public, three will be *ex officio* members from the IRB (the Chair and the Deputy Chairs) and the Chair of the Committee will be appointed by the government. No indication has been given as to whether the Committee intends to operate by consensus, or by majority vote.

RESTRUCTURING INVESTIGATIONS AND HEARINGS BY THE REFUGEE DIVISION

A. The Hathaway Report

The Hathaway Report has been briefly discussed above in connection with the appointment process. Its full effect, however, was seen in the Board's announcement of 3 March 1995 and the restructuring of the roles of both members and refugee hearing officers (RHOs). The report had been commissioned by the Board partly because of allegations that RHOs had been discussing individual refugee cases privately with the members who would be deciding those cases. In addressing that and other issues, Professor Hathaway called for a complete restructuring of roles.

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(36) *The Ottawa Citizen* (Valley Edition), 3 March 1995, p. A3.

Professor Hathaway recommended a refugee determination model in which the RHO would concentrate on pre-hearing research; instead of questioning the claimant at the hearing, the RHO would attend briefly, if so requested by a member, and then leave the room. The members would assume responsibility for eliciting evidence in the hearing and would become active and engaged participants in the process.[37] In this manner, refugee determination would move from an inappropriate adversarial model to an inquisitorial model better suited to the broader fact-finding nature of the endeavour.

Hathaway argued that the inquisitorial model was mandated in the *Immigration Act*. He concluded that as long as the current adversarial model continued, particularly with regard to the conduct of some RHOs, anything more than routine contact between the RHOs and members would give rise to questions of bias. On the other hand, the proposed model, including the removal of the RHO from the hearing room, would make contact between the two groups an appropriate and necessary part of assisting the member to reach a careful decision based on all the available evidence.[38]

B. Restructuring of the Refugee Division

The Board adopted many of Professor Hathaway's recommendations, but not all.[39] Calling its new procedures for refugee determination a "specialized board of inquiry model," the Board announced that RHOs would be renamed "refugee claims officers" (RCOs) to emphasize their enhanced investigatory and case-preparation role prior to the hearing. All claims will first be screened on paper and in an interview by an RCO to determine if they can be expedited. If so, they will be referred to a single member as happens now.

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(37) *Hathaway Report*, p. 70-74. After describing the current passivity of many members, Hathaway noted (p. 25-6): "The thrust of these observations is to call a halt to what one member described as the 'conversion of decision-makers to highly paid automatons'."

(38) *Ibid.*, p. 44-46.

(39) See, Immigration and Refugee Board, *Refugee Status Determination Process: Specialized Board of Inquiry Model, Operational Framework*, 3 March 1995.

Non-expedited claimant files will be assigned to a team composed of one member (anticipating the legislative change to single-member panels) and an RCO, each of whom will be specialists in the relevant geographic area from which the claimant is fleeing. (The RCO assigned will *not* be the one who decided that the case should not be expedited and the notes of the original assessment will not be forwarded.) Together the member and the RCO will identify problem areas and the research needs of the case. All investigation and research will then be carried out under the supervision of the member.

Guidelines will be developed to govern member and RCO contact outside the hearing room. At a minimum, RCOs will not be permitted to offer opinions as to the existence of persecution in the country of origin or the merits of the claim. This is in keeping with the role of the RCO as advisor to the member; however, it is difficult to understand how it could be ensured that the guidelines were being followed in private conversations in the course of a close working relationship.

As Hathaway recommended, members will become more engaged and active participants in the hearing process, while remaining fair and impartial. In a clear departure from his recommendations, however, the Board has decided that the RCO will usually remain in the hearing room to assist the panel on such matters as country conditions and procedural issues. The RCO will examine claimants when invited to do so by the member.

When would that be? Representatives of the Board explain that questioning by the RCO will be advisable when issues relating to the exclusion clauses arise,[40] and when credibility is in issue. Such participation may render this "modified Hathaway model" contentious, as discussed below.

Other important aspects of the Board's announcement included the following:

- RCOs will have an enhanced mandate for investigation, supervised by the member and subject to full disclosure to the claimant.

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(40) The Convention does not apply to a person with rights equivalent to those of citizenship in a third country, or to a person believed on serious grounds to have committed a crime against peace, a war crime, a crime against humanity or a serious non-political crime outside Canada.

- The Board will publish a list of domestic Canadian agencies that RCOs may contact at each level of government. The permission of the claimant will not be required, but all information received must be disclosed.

- RCOs will be permitted to contact Canadian government sources overseas. The collection of country of origin information by posts abroad will be enhanced through Board and Department (International Services Group) cooperation.

- For the first time, claimant-specific information may be sought from Canadian posts overseas. Contact must be preceded by written notice to the claimant and counsel and an opportunity provided for them to voice concerns and suggest alternative strategies or sources.

- All relevant immigration documentation will be provided to the Board as a matter of course and disclosed to the claimant. A Working Group will be established with the Department to facilitate this, as well as to standardize the collection of data relevant to claimants' identities, background, and circumstances.

- Guidelines will be developed governing disclosure of the research plan, information collected, and contacts made with domestic agencies.

- Both RCOs and members will have geographic specialties, in order to enhance expertise. Specialists in the different regions will meet in order to foster national consistency.

- Hearings will be immediately preceded by a conference to complete disclosure, agree on the issues and any procedural matters, discuss the evidence and identify exhibits to be filed.

- Administrative and hearing procedures will be developed to reflect the new specialized board of inquiry model, as will a new description of the role of members.

- Guidelines will be established governing the participation of RCOs at hearings. A system of monitoring and evaluation will be established.

- Disclosure by all parties will be monitored in order to ensure that it is carried out fully and in a timely manner.

- The contents and use of the Personal Information Form (PIF) will be reviewed.

- Internal guidelines will be developed for complaints against RCOs. Procedures will be reviewed regarding the handing of complaints against unprofessional counsel. The Board will make a recommendation to the Minister to license lay counsel.

- Special procedures will be developed for hearing gender-related claims, those involving torture, and those for unaccompanied children.

- Written reasons in positive decisions will be requested where this would develop the law or enhance consistency.

C. Discussion

The Board has responded comprehensively both to the Hathaway Report and to numerous other critics. This is no mean feat, considering the opposing and competing ideologies involved. On the one hand, Board members will change from being often-passive decision-makers to being leaders of a team engaged in a comprehensive inquiry into a refugee claim. The result should be a greater coordination of investigation and research needs, since the member will be involved from the beginning. Thus, RCOs should no longer spend significant amounts of time on research that is never used.

Similarly, the possibility of a member's seeing the file only minutes before the beginning of a hearing should become a thing of the past. With informed members and preliminary conferences, hearings should be more focused and shorter. On the other hand, where a negative decision has ensued from a short, focused hearing, it is possible that counsel will find the record inadequate for purposes of judicial review. For this reason, if counsel fears a negative decision, it will be in the claimant's best interest to have as complete a hearing as possible. Thus, hearings in these circumstances may not be as short as the Board hopes.

The accountability of RCOs as agents of the panel will also be emphasized in the new model. Because of RCOs' ongoing presence in the hearing room and the possibility of a continuing role for them in questioning claimants under the "modified-Hathaway model," some criticism may be expected. As has been noted above, the Board says that RCOs might participate in the hearing when the exclusion clauses and issues of credibility arise. Eliciting evidence and providing argument regarding exclusion, generally agreed to be more adversarial than the rest of the hearing,[41] is more properly the role of the Minister's representative.

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(41) See *Immigration Act*, section 69.1(5)(a)(ii).

While the Board has committed itself to working more closely with Citizenship and Immigration Canada to ensure the participation of the Minister's representative, this may not always be possible and it will fall to the RCO to handle the issue.

Credibility is often a critical aspect of the refugee claim. As noted in the UNHCR Handbook: "Due to the importance that the definition [of Convention refugee] attaches to the subjective element, an assessment of credibility is indispensable where the case is not sufficiently clear from the facts on record."(42) Since clear cases will presumably have been recommended for the expedited process, only the more difficult cases will proceed to a hearing; thus it is hard to predict the significance and implications of the RCOs' role in hearings.

The strength of the criticism of the Board's model may ultimately depend on the contents of the proposed guidelines for RCOs inside and outside the hearing room, and the determination and ability of Board members to exert control in the hearing.

The Board will be significantly increasing its investigatory and research capacity, in response to those, including Hathaway, who have criticized weaknesses in that area. With overseas research capability enhanced (both generally and in relation to specific claimants), liaison procedures worked out with domestic agencies, and all relevant information from Citizenship and Immigration Canada forwarded as a matter of course, the Board will no longer be open to the charge that it decides refugee claims in a vacuum.

The goals of restructuring are to restore the Board's credibility, focus its research, increase its effectiveness, and streamline its operations,(43) while preserving a fair refugee determination system. It will take considerable time to see whether these goals are all attainable.

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(42) *Handbook*, paragraph 41. Paragraph 42 notes the importance of credibility to the objective element of the definition as well.

(43) The government has announced its intention to reduce the size of the Board from 175 members to 112.

APPENDIX A

Law Reform Commission of Canada

Draft Final Report, 1992 (Extract)

2.3.3 CHARACTERISTICS OF THE NEW HEARING PROCESS

2.3.3.1 COMPOSITION OF DECISION-MAKING PANELS

The composition of decision-making panels has important implications in the refugee determination process. Two-member and single-member panels both have their advantages and disadvantages. Single-member panels at first look more cost-effective, but may need to be balanced by comprehensive appeal or review procedures. Two-member panels, on the other hand, are likely to result in a higher level of acceptances, and entail the measure of additional costs in support and scheduling.

It is also argued that the superadded requirement of unanimity in negative decisions is not conducive to responsible decision-making,[127] although in theory such arrangements may justify less extensive appeal opportunities. It must be recalled, however, that in enacting Bill C-55, Parliament made a political choice in favour of claimants, when it institutionalized the benefit of the doubt by requiring unanimity for negative decisions at every level.

Many counsel and representatives of non-government organizations expressed fear in leaving the fate of refugee claimants in the hands of a single member of the Convention Refugee Determination Division of the Immigration and Refugee Board. This fear suggests a lack of confidence in the capacity of individual board members to

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[127] In the sense that a well-reasoned but negative decision can always be upset even by an unreasoned positive determination. The decided cases reveal few instances of reasoned dissent.

make reasoned and reasonable decisions. Most refugee advocates favour two-member panels working under the rule that a positive decision from either panel member results in recognition of the refugee claim. This minimizes the risk that claimants will be wrongly excluded from refugee status.

Many board members favour two-member panels because they allow the burden of decision-making to be shared. The two-member panels also promote collegiality by affording members the opportunity, over time, to sit in hearing with a number of other members. Nowhere else in the Canadian legal system, however, is an issue of credibility left to be determined initially by two decision-makers with the opinion of one of them carrying the day, not even in criminal trials where consequences for the accused are potentially devastating. In jury trials unanimity is required to either convict or acquit. If all the jurors cannot agree on a verdict, a new trail must be held. In most instances throughout the legal system a single judge or adjudicator is entrusted with the duty to assess credibility and to grant the benefit of the doubt. Where cases are heard by panels of more than one person, decisions are taken either by consensus or by majority vote. In no other instance does a split in the decision-making panel automatically result in a decision, either affirmative or negative.

The case for single member decision-making at first instance is appealing from both a costs and case-management perspective. Provided adequate hearing room facilities are available, the present complement of board members could handle a larger number of cases in a given time period if they were sitting singly. With fewer individuals to be co-ordinated, scheduling of cases would be less complex. The single-member panel also places the burden for deciding each case clearly on the

shoulders of the individual member presiding and may thus be expected to contribute to more reasoned and responsible decision-making. The risks faced by individual claimants in having their case heard by only one member of the Convention Refugee Determination Division of the Immigration and Refugee Board can be effectively offset by providing that initial decisions taken by single-member panels be subject to an effective form of review.

On balance, and subject to appropriate review procedures, we are convinced that the advantages of having initial hearings before a single member of the Convention Refugee Determination Division of the Immigration and Refugee Board outweigh the advantages provided by the present two-member panels. Persons who are not capable of reaching reasoned and responsible decisions on their own should not be appointed to the Board. Training should be provided to ensure that those who are appointed are adequately equipped to discharge their responsibilities. Individuals who, after reasonable training, are incapable of handling the job should be removed from the Board. The system should not be designed to compensate for the inadequacies of individuals who are not capable of meeting the challenges of the job.

Collegiality among board members can be promoted effectively by allowing them greater opportunities to participate in the formulation of Board policy and by allowing them more time to interact with colleagues outside the context of hearings. Not all of the increased capacity derived from deploying members to sit singly rather than in twos need be devoted to holding additional hearings. Members can benefit by being allowed a substantial increase in the time available for writing decisions, for training and for participation with colleagues in Board activities.

It is therefore recommended that:

18. **Decisions on refugee claims should be taken by single-member panels of the Convention Refugee Determination Division of the Immigration and Refugee Board.**

APPENDIX B

Citizenship and Immigration *News Release*, 2 March 1995

BACKGROUND

THE OPERATION OF THE ADVISORY COMMITTEE

The Advisory Committee will be composed of a Chairperson, one representative from the legal community, one chosen from non-governmental organizations involved in refugee matters, one member of the general public and the Chairperson of the IRB. The Deputy Chairpersons of the IRB are ex officio members of the Committee. The Committee cannot be chaired by a member of the IRB.

The IRB will advertise for applicants who are interested in employment with the IRB in the Canada Gazette. Other candidates who come to the attention of the government may be referred to the Advisory Committee. All applications will be received by the IRB, in their role as Secretariat to the Advisory Committee, and sent to the Committee. Applicants recommended by the Advisory Committee will form an inventory of suitable candidates, to be drawn from as vacancies arise. Once a recommendation has been made by the Advisory Committee, it will be valid for two years.

The Advisory Committee will submit the applications to a selection process, based on criteria to be provided by the Minister. That process and the decision to interview candidates is left to the Advisory Committee to determine.

All proceedings of the Advisory Committee will be of a confidential nature and solely for the use of the Minister. This is vital to the integrity of the system and the independence of the Advisory Committee members. Few people would want to serve on a Committee such as this if the confidentiality of their deliberations and recommendations was not respected. As well, few people would want to submit their application to a process that is not confidential.

The Advisory Committee will assess the applicants in accordance with uniform criteria reflecting the preferred personal and professional qualifications, the desired awareness of immigration and refugee matters, the required linguistic proficiency and the working abilities needed to conduct oral hearings and write decisions. The Advisory Committee will also be mindful of the desirability of reflecting gender balance and the diversity of Canadian society in the composition of the appointments. A statement of qualifications will be defined by the Minister in consultation with the Chair of the IRB. Once finalized, the statement of qualifications will be made public.

Prior to a call to applicants being published in the Canada Gazette, the Minister would receive from the Chair of the IRB a statement of the requirements of the Board. The Chair would provide the Minister with an indication of which members whose terms are expiring: do not wish to be re-appointed; are not recommended for re-appointment; and are recommended by the Chair for re-appointment based on performance evaluations. The Minister is committed to recommend to the Governor in Council, only those candidates for appointment or re-appointment who have been recommended by the Advisory Committee.

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